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(presently known as The Royal Bank of Scotland
N.V.)*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

ABN AMRO BANK N.V. (presently known as
THE ROYAL BANK OF SCOTLAND N.V.),

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. 11-02760 (SMB)

**APPELLEE ABN AMRO BANK N.V.
(presently known as THE ROYAL
BANK OF SCOTLAND N.V.)'S
COUNTER-STATEMENT OF THE
ISSUE TO BE PRESENTED ON
APPEAL AND COUNTER-
DESIGNATION OF AN
ADDITIONAL ITEM TO BE
INCLUDED IN THE RECORD ON
APPEAL**

Pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland N.V.) (“RBS/ABN”), by and through its undersigned counsel, respectfully submits the following counter-statement of the issue (the “Counter-Statement”) and counter-designation of an additional item to be included in the record on appeal (the “Counter-Designation”) in response to the Trustee’s Statement of Issues to be Presented and Designation of Items to be Included in the Record on Appeal, dated March 27, 2017 [Dkt. No. 81], submitted by Irving H. Picard (the “Trustee”), as trustee of the substantively consolidated estate of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act (“SIPA”), 15 U.S.C. §§ 78aaa, et seq., and Bernard L. Madoff, individually.

I. COUNTER-STATEMENT OF THE ISSUE TO BE PRESENTED ON APPEAL

RBS/ABN hereby submits the following Counter-Statement as the only issue properly on appeal.¹

1. Whether the doctrine of comity of nations bars the Trustee’s recovery of property, pursuant to Section 550(a) of the Bankruptcy Code, when the property has been subsequently transferred from a foreign transferor to a foreign transferee.

¹ In the Trustee’s statement of the issues, he includes “the extraterritorial application of SIPA and Section 550(a) of the Bankruptcy Code,” which is an issue that the Bankruptcy Court explicitly declined to reach with regard to the Harley Action and is not a question at issue in the Trustee’s appeal of the Harley Action in the first instance. *See Sec. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, Adv. Pro. No. 08-01789 (SMB), Adv. Pro. No. 11-02732 (SMB), 2016 WL 6900689 at **1, 16 (Bankr. S.D.N.Y. Nov. 22, 2016) (“These subsequent transfer claims are dismissed on grounds of international comity without reaching the issue of extraterritoriality.”). The presumption against extraterritoriality as applied to SIPA and Section 550(a) of the Bankruptcy Code when the property at issue has been subsequently transferred from a foreign transferor to a foreign transferee serves as an alternative basis to affirm the judgment of the Bankruptcy Court, but raising that issue is RBS/ABN’s prerogative, not the Trustee’s. *See Freeman v. Journal Register Co.*, 452 B.R. 367, 369 (S.D.N.Y. 2010) (“The Court may affirm on any ground and need not limit its review to the bases raised or relied upon in the decisions below.”).

II. COUNTER-DESIGNATION OF AN ADDITIONAL ITEM TO BE INCLUDED IN THE RECORD ON APPEAL

RBS/ABN hereby counter-designates the following additional item to be included in the record on appeal. RBS/ABN reserves its right to designate additional items for inclusion in the record. For the item designated, the designation includes all documents referenced with the particular document number including, without limitation, all statements, appendices, exhibits, attachments, declarations, and affidavits related thereto.

Item No.	Date	ECF No. (11- 02760)	ECF No. (08- 01789)	Docket Text
1	3/28/2017	83	15451	<i>Objection Memorandum of Law in Opposition to Trustee's Request for Certification of Judgment for Direct Appeal to the United States Court of Appeals for the Second Circuit Pursuant to 28 U.S.C. 158(d)(2) and Federal Rule of Bankruptcy Procedure 8006(f)</i> (related document(s) 77) filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 03/28/2017)

Dated: April 10, 2017
New York, New York

Respectfully submitted,

ALLEN & OVERY LLP

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